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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1122

DAVID C. HENNY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

		Page
I.	Citations to Opinions Below	1
II.	Jurisdiction	2
III.	Questions Presented	2
IV.	Constitutional and Statutory Provisions Involved	3
V.	Statement of the Case	3
	A. Procedural Background	3
	B. Factual Background	3
	1. Standard Operating Practices	4
	2. Jencks Act Statements	6
VI.	Reasons for Granting the Writ	6
	A. This Case Involves a Question of Exceptional Importance to the Concept of Due Process of Law	6
	B. The Opinion of the Court Below Is In Conflict With Applicable Decisions of the Court of Appeals In Other Circuits	12
VII.	Conclusion	14
	Appendices:	
	Appendix A	A-1
	Appendix B	A-11
	Appendix C	A-12
	Appendix D	A-22

TABLES OF AUTHORITY

Table of Cases

Carter v. Carter Coal Co., 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1935) 7-8

Connolly v. General Construction Co., 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1925) 7

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Page

Frontiero v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) 8

Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966) 12

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1938) 7

Pallotta v. United States, 404 F.2d 1035 (1st Cir. 1968) 12

United States v. Curry, 515 F.2d 1299 (4th Cir. 1975) 12

United States v. Frazier, 479 F.2d 983 (2d Cir. 1973) 12

United States v. Lepiscopo, 429 F.2d 258 (5th Cir. 1970) *cert. denied*, 400 U.S. 948 (1970) 12

United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968) 12

United States v. Stahl, 393 F.2d 101 (7th Cir. 1968) 13

Constitutional Provisions

U.S. Const. amend. V 7, 8, 10, 13

U.S. Const. amend. VI 10, 13

Statutes

18 U.S.C. § 1343 .....2, 3, 6

18 U.S.C. § 2511 3

18 U.S.C. § 3500 (Jencks Act) 2, 3, 6, 12, 13

28 U.S.C. § 1254 2

Other Authority

Supreme Court Rule 22 2

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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, David C. Henny, respectfully prays that a Writ of Certiorari be issued to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled matter, Cause No. 74-2717, as of October 20, 1975.

I.

CITATIONS TO OPINIONS BELOW

The final amended Opinion of the United States Court of Appeals for the Ninth Circuit is printed in Appendix A (p. A-1). The Opinion has not yet been reported.

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II.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit was filed October 20, 1975. A Petition for Rehearing was timely filed on November 17, 1975, the Court of Appeals having previously granted an extension of time. The Petition for Rehearing was denied on January 9, 1976, by an Order printed in Appendix B (p. A-11) which also amended the original Opinion of the Court dated October 20, 1975, printed in Appendix C (p. A-12).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Rule 22 of this Court.

III.

QUESTIONS PRESENTED

A. May a conviction for fraud under 18 U.S.C. § 1343 be based upon an alleged violation of industry "standard operating practices" when:

i. no standard operating practices exist,

ii. the alleged standard operating practices have not been adopted by statute or regulatory agency, have not been reduced to writing and are not ascertainable by any fixed standard,

iii. the jury was charged that violation of standard operating practices was unlawful?

B. Is an accused denied the right to a fair trial when the trial court requires the defendant to request Jencks Act statements in the presence of the jury, then advises counsel and the jury that the only reason for looking at the statements is to find inconsistencies in the witnesses' testimony?

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IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States. The statutes involved are Title 18 U.S.C. § 1343 and 18 U.S.C. § 3500. Each of the authorities is set forth verbatim in Appendix D (p. A-22).

V.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner was indicted in the Western District of Washington and charged with violation of 18 U.S.C. § 1343, the wire fraud statute, and 18 U.S.C. § 2511. A plea of not guilty was entered as to each count. All counts charging violation of § 2511 were dismissed during trial; the jury returned a verdict of not guilty as to one count; and the United States Court of Appeals for the Ninth Circuit reversed one count. The defendant stands convicted on the remaining counts.

Jury trial commenced April 1, 1974. Following a verdict of guilty the petitioner moved for judgment of acquittal or new trial. This motion was denied and an appeal was timely taken. The appeal resulted in the Opinion and Judgment that petitioner now asks this Court to review.

B. Factual Background

The petitioner, David C. Henny, is the president and majority shareholder of Whidbey Telephone Company ("Whidbey"), an independent telephone utility franchised to serve an area on Whidbey Island in Puget Sound, Wash-

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ington. Whidbey is regulated by the Federal Communications Commission and the Washington Utilities and Transportation Commission. Whidbey's communications network connects with that of General Telephone Company of the Northwest, Inc. ("General") which in turn connects with Pacific Northwest Bell, one of the Bell System[1] companies.

Within the telephone industry it is not unusual for connecting companies to agree contractually upon a sharing of revenues derived from long distance telephone operations. During the years 1961 to 1966, however, Whidbey had no such agreement with any telephone company. Commencing in 1967 Whidbey and General entered into agreements whereby General agreed to pay to Whidbey all costs incurred by Whidbey in providing long distance services, together with a reasonable rate of return.

1. *Standard Operating Practices*

The indictment charges that petitioner violated "industry-wide standard operating practices" within the telephone industry relative to the method by which calls were classified among telephone companies; the meaning of operator codes; the reporting between companies of telephone calls placed by a company, its employees or agents; the methods of providing services (such as "time of day") to customers; and other related matters. Petitioner denied the existence of "industry-wide standard operating practices" pertaining to those matters, and has continually maintained that valid business reasons, consistent with both the prior practices

1. The Bell System is comprised of twenty-three telephone companies owned or controlled by the American Telephone and Telegraph Company. There exist several hundred independent telephone companies, including Whidbey, which are not a part of that system.

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of Whidbey and the contracts between Whidbey and General, required the reporting and classification of calls by the methods actually utilized.

The existence or nonexistence of "industry-wide standard operating practices" was one of the critical factual issues in the case. The Government introduced testimony of the practices of the Bell System and contended that such practices constituted industry-wide standards. Petitioner introduced proof through both cross-examination and the direct testimony of the petitioner that each telephone company had operating practices different from other companies. Throughout the trial petitioner was prevented from introducing testimony as to the operating practices of non-Bell System telephone companies other than Whidbey, it being the position of the trial court that such evidence was not relevant.

There exists no statute, rule, or regulation which requires a telephone company to comply with operating practices of some other telephone company or group of telephone companies. With the exception of a manual prepared by the Bell System for the use of its employees, there was no evidence of written documentation describing any standard practices.

The trial court charged the jury that telephone companies are subject to regulation by the Federal Communications Commission, that the FCC establishes rules under which telephone companies must operate, that telephone companies agree upon a method of dividing toll revenues, that companies have adopted standard operating practices, and that any practice which violated these standard operating practices is unlawful.

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2. *Jencks Act Statements*

Prior to trial the petitioner had requested the production, pursuant to the Jencks Act, 18 U.S.C. § 3500, of any statements of Government witnesses. The court denied petitioner's motion and ordered that defense counsel could not examine the statements until the conclusion of each witness's direct testimony. At trial, on the first occasion that a request for Jencks Act statements was appropriate, defense counsel requested "statements" in a manner that would not excite the jury's attention. The court, however, emphasized defendant's request by asking the prosecutor for any "Jencks Act statements." Defense counsel was thereafter required to go through the ritual of requesting the statements in the presence of the jury. On one of these occasions, the court made the following remark which, as characterized by the Court of Appeals, "may have been better left unsaid . . . :"

> MR. BURGESS: Are there any Jenks [sic] Act statements . . .
>
> THE COURT: Well, I had hoped that you would have had a chance to examine these. All you are looking for is some inconsistency in her testimony, if there is any, ...

This statement was made in the presence of the jury.

VI.

REASONS FOR GRANTING THE WRIT

A. This Case Involves a Question of Exceptional Importance to the Concept of Due Process of Law

Petitioner stands convicted of criminal fraud under the provisions of 18 U.S.C §1343. The basis of the "fraud" was petitioner's alleged failure to comply with so-called "standard operating practices" of the telephone industry.

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The propriety of this conviction presents a question of exceptional importance to the basic concept of our system of criminal justice. At the core of the criminal justice system lies the requirement of due process of law embodied in the Fifth Amendment to the Constitution. Among the fundamental elements of due process are the requirements that prohibited activity be clearly and unambiguously proscribed, that the enactment of such prohibition not be delegated to private parties, and that the proscription not be unjustifiably discriminatory.

Due process of law requires that a criminal prohibition be sufficiently specific that one need not guess at its meaning. *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1925); *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888 (1938). In *Connally* this Court stated (269 U.S. at 391):

> . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Furthermore, any delegation of authority to one member or segment of an industry to regulate the entire industry is repugnant to the due process clause of the Fifth Amendment. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1935). In *Carter*, Congress had delegated to a stated percentage of coal producers and mine workers the power to regulate wages and hours for the industry. In striking down the enactment, this Court stated (298 U.S. at 311):

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official

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> or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.
>
> • • •
>
> And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question. (Citations omitted)

Finally, judicial imposition upon an entire industry of operating practices promulgated by one member or segment of that industry, constitutes discrimination against the non-consenting members and results in a denial of due process. While the non-consenting members may be prosecuted criminally for failure to comply with the practices imposed by the powerful member, the latter is wholly immune from similar prosecution since its action sets the standard. This discrimination is so unjustifiable as to violate the fundamental concepts of equal protection prohibited by the due process clause of the Fifth Amendment. See *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973).

The opinion below, if permitted to stand, will be cited by prosecutors as authority for the proposition that non-compliance with "industry-wide standard operating practices" may be the sole basis for conviction.

We have found no prior authority supportive of this novel proposition. Neither the Government nor the Ninth Circuit has cited such authority. Yet the result now approved by the Ninth Circuit permits imposition of criminal sanctions for non-compliance with the elusive and unde-

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fined standards encompassed within the term "standard operating practices." A businessman may become a potential criminal defendant without awareness that others in the industry have placed him in that position.

The foregoing characterization of the result is not merely an exaggerated or absurd hypothetical possibility. Petitioner's case is itself a perfect example. Petitioner was charged with criminal fraud based upon the allegation that his company failed to comply with "industry-wide standard operating practices." Petitioner's request for a bill of particulars defining the alleged "standard operating practices" was denied. At trial, the prosecution introduced in evidence the operating practices of the Bell System as defining "standard operating practices." Petitioner freely conceded that his company's practices did not in all respects conform to the Bell practices. However, petitioner's attempts to introduce evidence that other non-Bell System telephone companies also adopt practices not conforming to the Bell practices were rejected. Likewise, petitioner's attempts to introduce evidence of the time of adoption and purposes of his company's practices were repeatedly rejected. Upon completion of the evidence, the trial court instructed the jury that telephone companies are regulated by the Federal Communications Commission; that telephone companies by agreement divide revenues obtained from use of combined toll facilities; that the companies have adopted standard operating practices relating to the timing, reporting and billing of calls; and that any practice which does not properly reflect such timing, billing or reporting "is unlawful."[2]

2. The instruction is quoted in its entirety at App. A, pp. A-5-6, footnote 3.

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On appeal the Ninth Circuit approved exclusion of petitioner's offered evidence relating to the practices of other non-Bell System telephone companies on the basis that ". . . the time expended and confusion created by proving the reporting practices of individual companies outweighed the minimal aid such evidence would provide in proving industry-wide standards." (App. A, p. A-7). The Ninth Circuit thereby approved the proposition that one dominant company may, by unilateral fiat, impose operating practices binding upon the entire industry. It is, of course, true that a showing of other inconsistent practices extant within the industry would create confusion as to any definition of "industry-wide standard operating practices." That is the precise point of petitioner's argument. Imprecision or confusion of definition clearly demonstrates the due process infirmity of any attempt to impose criminal sanctions in this or any other similar situation. Rejection of petitioner's offered evidence relating to operating practices within the industry effectively denied him the opportunity to present a defense in violation of the Fifth and Sixth Amendments.

Petitioner argued to the Ninth Circuit that the trial court's instruction was improper as being confusing, misleading, inconsistent, and stating a crime which was neither charged in the indictment nor legally supportable. Petitioner urged that the instruction improperly inferred (1) that FCC regulations had the force of criminal law; (2) that FCC regulations had incorporated "standard operating procedures;" and (3) that therefore violation of such operating procedures was per se "unlawful" as a separate crime. Petitioner pointed out that in fact neither statute, regulation nor contract required compliance with any standard operating procedure. The opinion of the Ninth

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Circuit responded to petitioner's arguments as follows (App. A, p. A-6):

> However, *the illegal practices* defined in the judge's instruction referred only to the *violation of the standard operating procedures* adopted by companies to divide revenues and did not refer to the FCC's rules. [Emphasis added]

The Ninth Circuit has thus expressly approved the proposition that violation of standard operating procedures may properly be characterized as per se "illegal practices" in the context of a criminal proceeding. This characterization, coupled with the court's acceptance, as a matter of law, of the Bell System procedures as industry-wide standards, creates an entirely new concept of criminal law.

The implications of this concept are far reaching and frightening. There are numerous regulated industries within the United States. Trucking, passenger carriage, communications, air carriers, food processors and drug producers are a few obvious examples. Members of these industries range from small proprietorships to huge national corporations. All have, however, been required to operate under governmental regulation. Now, pursuant to the Ninth Circuit Opinion in this case, the dominant members of an industry will have the unprecedented power to promulgate "standard" operating procedures and to force industry-wide compliance under threat of criminal sanction. Federal prosecutors will have a powerful new tool which is unnecessary and holds the potential of gross abuse. Historical notions of due process of law will be destroyed or badly eroded.

It is of vital importance to the health of the nation's business community that businessmen have the ability to operate under independent and often innovative pro-

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cedures so long as not proscribed by statute, regulation or contract.

This Court should accept review and provide definitive guidance with respect to the novel and dangerous concept propounded by the court below.

B. The Opinion of the Court Below Is In Conflict With Applicable Decisions of the Courts of Appeals For Other Circuits

Gregory v. United States, 369 F.2d 185, 191 (D.C. Cir. 1966) condemned as reversible error, conduct identical to that condoned by the Ninth Circuit in the instant case, i.e., that Jencks Act statements be described so as to permit the jury to infer that prior testimony is consistent with the witness's testimony at trial. *Gregory* held that the mere transfer of Jencks Act statements within the presence of the jury created such an impermissible inference that reversal was required.

Other Circuits[3] express agreement with the *Gregory* case in holding that delivery of Jencks Act statements should ordinarily be made outside the presence of the jury. However, those Circuits have supplemented *Gregory* by granting discretion to the trial court as to the exact procedure to be followed. The Fifth Circuit, as an example, has held that it is discretionary as to whether Jencks Act material should be delivered outside the *presence* of the jury, but it is mandatory that colloquy concerning such delivery be out of the *hearing* of the jury. *United States v. Williams*, 447 F.2d 894 (5th Cir. 1971).

3. *United States v. Curry*, 512 F.2d 1299 (4th Cir. 1975); *United States v. Frazier*, 479 F.2d 983 (2d Cir. 1973); *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968); *Pallotta v. United States*, 404 F.2d 1035 (1st Cir. 1968); *United States v. Lepiscopo*, 429 F.2d 258 (5th Cir. 1970), *cert. denied*, 400 U.S. 948 (1970).

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The Court of Appeals for the Ninth Circuit has in the case at bar, nevertheless totally rejected the *Gregory* decision by stating, "We do not choose to follow *Gregory*." App. A, p. A-9) The Circuit further rejects totally the concept announced by other Circuits by approving a statement of the trial court in front of the jury that "[a]ll you [defense counsel] are looking for is some inconsistency in her testimony, if there is any." (App. A, p. A-9) Approving that statement contradicts a holding in the Seventh Circuit that:

> [c]omment by the court, such as that here made, may serve only to compound the error. *United States v. Stahl*, 393 F.2d 101, 105 (7th Cir. 1968).

The comment described by the *Stahl* court was the trial court's indication that the reason the statements were delivered to defense counsel was "to see if she [the witness] is telling the same story today . . . ." (393 F.2d at 105) and the error was the delivery of Jencks Act statements before the jury.

It is inconceivable that a matter as significant as the constitutional right to confront a witness and the requirements of the Jencks Act, 18 U.S.C. § 3500, would be recognized in a different way by different Circuits. Surely a defendant tried within the Ninth Circuit must have the same right to not have a witness's credibility established by comments of the trial court as does a defendant tried within any other Circuit.

The Fifth and Sixth Amendments require due process and the right to confront a witness. Those constitutional provisions, together with the Jencks Act, require that nothing be done to allow the jury to infer that prior statements of a witness are consistent with present testimony. The

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holding in the case at bar is directly in violation of that proposition and the holdings of the Circuits. Uniformity of decision is required in this significant and important area of a criminal defendant's rights.

VII.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

(AMENDED: JANUARY 9, 1976)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID C. HENNY, *Defendant-Appellant.*	No. 74-2717 OPINION

[October 20, 1975]

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING, CARTER and GOODWIN, Circuit Judges.

JAMES M. CARTER, Circuit Judge.

Defendant Henny, President and General Manager of the Whidbey Telephone Company, appeals from a judgment of conviction, following a jury trial, of a number of counts of wire fraud in violation of 18 U.S.C. § 1343 and aiding and abetting under 18 U.S.C. § 2. He received sentences of three years on each count, to run concurrently, and a fine of $1,000 on each of ten counts. We affirm in part and reverse in part.

Whidbey Telephone Company ("Whidbey") is an independent company serving approximately 2,700 subscribers on two islands in Puget Sound, Washington. It is regulated by the Federal Communications Commission ("FCC") (interstate) and the Washington Utilities and Transportation Commission ("WUTC") (intrastate). The toll (long distance) facilities of Whidbey interconnect at Everett,

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Washington, with the General Telephone Company of the Northwest ("General"), which interconnects with Pacific Northwest Bell ("Bell") at Seattle. Since it was necessary for the lines of the various telephone companies to interconnect to provide service to all subscribers, the toll costs and revenues for toll calls were usually divided among the companies on the basis of toll settlement or division of revenue agreements. However, during the years 1961-66, Whidbey had no sharing agreement with General and accordingly did not share its revenue with General.

Under the settlement agreement in effect from 1967 through August 15, 1970, Whidbey undertook to pay all revenues or charges at tariff rates for certain types of toll messages to General (and a national toll "pool"), and General was to pay Whidbey an approximation of its toll costs under a formula determined by a 1966 study of Whidbey's toll costs. Three types of messages are important with respect to this formula:

> "*Sent paid* messages originated at a Whidbey telephone, and were billed to that phone. Whidbey was compensated for both the operating and billing function.
>
> *Sent collect* messages originated at a Whidbey telephone, but were billed to the terminating phone, hence compensation was only for the operating function.
>
> *Received collect* messages terminated at a Whidbey telephone and were billed there, but originated outside the Whidbey area; hence compensation was only for the billing function.

Under the General-Whidbey settlement agreement, General paid Whidbey a fixed sum for messages billed to Whidbey phones (i.e., sent paid and received collect messages), regardless of the duration of the call. In return, Whidbey paid the tariff rates for each such sent paid or received collect toll messages, but Whidbey's payments were determined by the duration and distance of the calls. The result was that Whidbey received the greatest net gain for calls of short duration and for sent paid messages. Whidbey received less on received collect and sent collect messages.

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The settlement agreement was subjected to various types of fraudulent manipulation by Henny, who personally authorized the actions. One scheme involved "person call back messages" for person-to-person calls originating at Whidbey, where the called party was not at home and instructions were given for the called party to return the call. According to proper industry practice, the called party should have been instructed to call operator "6" or "7" in returning the call. Operators "6" and "7" were local operators to the called party (non-Whidbey operators). These operators would "ticket" the return call. Therefore the call would be a received collect call for Whidbey.

Where the calling party had asked for the time and charges of his call, under industry practices the called party was instructed to use operator "55" to return the call. Operator "55" was a Whidbey operator, hence the call would be ticketed by Whidbey under the lucrative sent paid category. This was proper practice because Whidbey handled the major aspects of a "time and charges" call.

The fraud involved in the above situations was as follows:

(1) Henny instructed his operators to leave the operator "55" number with the called party on *all* person call back calls. By this means all received collect calls would be converted into sent paid calls. Both the called party and his local operator would not discover the fraud because they would have mistakenly presumed that "time and charges" had been requested by the calling party.

(2) Henny's friends or relatives also utilized the operator "55" scheme. When outside of the Whidbey area, they contacted a local operator and asked for operator "55," thus indicating they were returning a person-to-person call. The Whidbey operator recognized the caller and put in a false busy signal, misrepresenting that the Whidbey line was busy. All parties would hang up and the Whidbey operator would then place a call directly to the calling party and report the call as a sent paid message.

(3) Another scheme to defraud involved the reporting of free calls made by Whidbey's employees and friends.

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Tariffs permit certain free long distance calls by company employees. But Henny caused the free calls made by himself, his employees, and friends to be reported to General as sent paid official company calls of three minutes or less in duration, when in fact many of these calls far exceeded three minutes. The settlement payments made to Whidbey for each sent paid call exceeded the three-minute charge for such a call. Whidbey thus collected unearned settlements from General in many of the instances when Whidbey reported an official company message as a sent paid message.

(4) Similarly, Whidbey gained revenues by giving free toll calls to its customers to obtain "time" information from the mainland in violation of the tariffs.

(5) Another fraudulent scheme involved Henny's inflation of the number of messages reported as placed from Whidbey to Seattle in order to induce the construction of a direct microwave link between Seattle and Whidbey.[1] Whidbey reported "test calls" as sent paid calls; it also gave free toll calls to a Seattle weather recording, and reported the calls as three-minute sent paid calls. Both tactics were fraudulent under industry standard operating practices.

(6) The final fraud involved a holding time test conducted during the week of May 3, 1971, to determine settlement payments. Henny properly established a "conference circuit" for the test, but he allowed and encouraged illegal users of the line, "phone phreaks," to use the line during testing time, in order to increase General's settlement payments.

Refused Instruction on Franking Privileges

Many of the fraudulent schemes involved calls by Henny, his family, friends and employees. Henny claims that these calls were permitted by statute as a franking privilege. 47 U.S.C. § 210 (1934) so provided. Pursuant to this the-

1. The Washington Utilities and Transportation Commission conducted feasibility studies for such projects. It was this study which Henny manipulated.

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ory he sought jury instructions to the effect that it was not fraudulent to permit free use of the phones by employees and family members.[2]

Although Henny's friends were entitled to calls free from the tariffs, the conversion of received collect to sent paid messages and the timing and ticketing of these calls at three minutes or less, regardless of actual duration, constituted fraud. Since the franking privilege was irrelevant to settlement agreements, it was proper to refuse to instruct the jury on the privilege.

Jury Instruction

The trial judge gave an instruction to the jury which, Henny contends, was confusing and erroneous. In summary, the instruction stated that telephone companies are regulated by the FCC, that the companies also, by agreement, divide revenues obtained from the use of combined toll facilities, and that any device which avoids the proper billing is unlawful.[3]

2. The proposed instruction reads as follows:

"It is not a crime for a telephone company to provide unlimited free telephone service to its officers, agents, employees and their families, and to officers and employees of other telephone companies. The unlimited free telephone service provided by a telephone company to these persons includes unlimited free long distance toll calls. There is no limitation upon the length of each free long distance telephone call."

3. The complete instruction reads as follows:

"Now, this next instruction relates to telephone companies and their positions as far as being a common carrier is concerned. I am going to tell you what a common carrier is in the law, and how these companies must operate in accordance with the rules and regulations under the law. I might tell you this is one that I made up myself. This isn't something that is handed down.

"Telephone companies are known in the law as common carriers, and are subject to the regulations by the government through what is known as the Federal Communications Commission. You have heard that described here. This commission, in a supervisory capacity, established certain rules under which telephone companies must operate. Interstate calls are toll calls, and certain charges must be made by the companies that control the lines over which these toll calls are carried. The companies also, by agreement, divide the revenues obtained from the use of the combined toll facilities. In order to determine the proper proportions of revenue for each company whose facilities have been used for a toll call,

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The appellant contends that, since the jury convicted him, it apparently mistakenly interpreted the trial judge's instructions to mean that the FCC's rules have the force of criminal law. However, the illegal practices defined in the judge's instruction referred only to the violation of the standard operating procedures adopted by companies to divide revenues and did not refer to the FCC's rules.

Further, Henny claims that the instruction suggested that the mere breach of contract was illegal. This claim is unfounded because, in the words of the instruction, there is no mention of breach of contract. Criminal liability was said to attach only to "any billing practice that does not reflect the true nature of the toll call . . . or any use of the toll line by any device that avoids the proper billing of the toll call."

A final criticism is that the instruction assumed controverted facts not in evidence. The court stated that "the companies have adopted standard operating practices." Henny's contention misses the mark because he did not assert that there were no common practices, but he claimed that he was not subject to those practices because of his relationship to General and the uniqueness of Whidbey. It is not reversible error for the court to give an instruction which assumes an uncontroverted fact. *Lyons v. United States*, 325 F.2d 370, 374 (9 Cir. 1963).

While the instruction was not perfect, we fail to grasp how the jury could have been confused. The instructions which directly preceded the instruction at issue carefully listed and explained the critical elements of the charge; the scheme to defraud, specific intent, and causation. Reading all of the instructions together, as we must, we find that the instruction fully and fairly presented the issues and that any error in the disputed instruction was

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the companies have adopted standard operating practices providing for the timing of calls, and the point of billing, the ticketing, and the types of billing for the type of calls that are carried on connecting company lines. Any billing practice that does not reflect the true nature of the toll call as to the billing time, place of origin, nature of the toll call, or fails to show the use of the connecting lines or any use of the toll line by any device that avoids the proper billing of the toll call by the proper carrier is unlawful."

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harmless. *Suggs v. United States*, 407 F.2d 1272, 1276 (D.C. Cir. 1969); *United States v. Fox*, 425 F.2d 996, 1000 (9 Cir. 1970).

Exclusion of Evidence

Henny contends that Whidbey was entitled to recover its costs from General, that it could not recover such costs without the allegedly fraudulent practices, and that therefore the practices were proper. In support of this somewhat odd contention, the defense put on Henny's accountant, Mr. Bumstead, who testified that Whidbey had not recovered its costs from 1967 to 1970. On cross-examination, the prosecution sought to introduce two highly prejudicial letters to impeach Bumstead. Because of their prejudicial nature the court would not admit them, but instead struck Bumstead's testimony. Henny contends that this deprived him of his rights under the Fifth and Sixth Amendments to present witnesses and conduct a defense.

Whether or not the prejudicial nature of the letters would have warranted the striking of the testimony, the error, if any, was clearly harmless. All Bumstead could have shown would have been an overall loss. That would not have justified fraudulent practices, and Bumstead's testimony could not have helped Henny. *See United States v. Weiss*, 491 F.2d 460, 464 (2 Cir. 1974), *cert. denied*, 419 U.S. 833 (1974).

Henny also cites as error numerous exclusions of evidence made by the trial court on the ground of lack of relevance. Much of the proffered evidence related to industry-wide standards, but the evidence was irrelevant because either it post-dated the relevant time frame, or it involved the reporting practices of other individual companies pursuant to other types of settlement agreements. As to the latter, the time expended and confusion created by proving the reporting practices of individual companies outweighed the minimal aid such evidence would provide in proving industry-wide standards.

The appellant also claims that the court improperly restricted testimony of the defendant and other witnesses to the indictment period, 1967-70. Henny's defense was that the various practices found to be fraudulent were insti-

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tuted for proper reasons prior to the settlement agreement with General, and hence were admissible to show he lacked the specific intent to defraud General.

This contention fails. Although the court did exclude testimony of some witnesses as to the prior practices, such evidence was admitted elsewhere. The court admitted testimony showing the prior practice as to free long distance time, weather, and wake-up calls; the use of operator "61" (changed from "55" to "61" in March, 1970) by Henny's family and friends; and the ticketing and reporting of employee and test calls. The issue was fully submitted and argued to the jury. The defense itself, in closing argument before the jury, stated that the testimony introduced described the practices that existed prior to 1967.[4]

The court did exclude the answer to one relevant question. Henny was asked by defense counsel if the "operator 55 procedure [where friends would call "55" pretending to return a person-to-person call] was continued after January 1, 1971." The evidence was excluded because it was "outside the indictment period"; however, count VI of the indictment included fraudulent use of "55" from January 1971 to December 1972. Therefore we reverse count VI.

Jencks Act Statements

The appellant raises three contentions about the handling of Jencks Act [18 U.S.C. § 3500 (1957)] statements: he had to request such statements in the presence of the jury, he did not have sufficient time to review the statements, and the trial judge's remarks regarding the statements were improper.

One circuit has held it to be error for the judge to force defense counsel to demand and receive such statements in the presence of the jury. *Gregory v. United States*, 369

4. The defense stated that,

"There has never been, in this trial, any dispute as to the practices that went on at the Whidbey Telephone Company from the years early in 1960 up, almost to the present time. Those practices have not been in dispute. . . . In the testimony, as you will recall it, was that in the year 1966, all of the types of calls that have been described to you as being a part of a scheme, a part of a method to defraud, previously existed."

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F.2d 185, 191 (D.C. Cir. 1966). Other courts have held this to be within the discretion of the Judge.[5] We do not choose to follow *Gregory*. Moreover, in the case at bar, the judge did not uniformly force defense counsel to receive the statements in the presence of the jury. The first time objection was made, the following colloquy occurred:

> "THE COURT: We could have saved a lot of time if you [Mr. Carter, the attorney for the government] had given him that [the statements] at recess time.
>
> "MR. CARTER: Yes, Your Honor, I should have, and I am sorry."

On only one occasion thereafter did defense counsel have to ask for the statements in the presence of the jury.

The appellant's second contention, that counsel had inadequate time to review the statements, is also without merit. In the instance, cited above, where the statements were not furnished prior to the direct examination, co-counsel was present and able to review the statements. In addition, the defense did not ask for a recess.

Finally, the appellant cites as reversible error the statement of the judge, in front of the jury, that "[a]ll you [defense counsel] are looking for is some inconsistency in her testimony, if there is any." The record shows that defense counsel had objected to the procedure of allowing the trial to continue while co-counsel reviewed the statements withheld from the defense. In response to the objection the judge said, in essence, that he had hoped counsel had already examined the statements and that, in any case, co-counsel could adequately review them because he was present and would only be looking for inconsistencies.[6]

5. *United States v. Lepiscopo*, 429 F.2d 258, 260 (5 Cir. 1970), *cert. denied*, 400 U.S. 948 (1970); *United States v. Nielson*, 392 F.2d 849, 854 (7 Cir. 1968).

6. The record shows the following discourse:

"THE COURT: Do you [Mr. Carter, the attorney for the government] have another witness we can call so we can expedite this so we don't have to sit here while he reads it?

"MR. BURGESS [defense counsel]: Your Honor, I don't know what we are going to accomplish—

"THE COURT: Well, I had hoped that you would have had a chance to examine these. All you are looking for is some incon-

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While the remark may have been better left unsaid, it was reasonable in the context of the trial. Also, we doubt that the defendant was prejudiced because this witness, whose Jencks Act statement was delayed, was only one of the many Whidbey operators who had testified to the practices of the company .

Two issues remain. First, the trial judge, after a hearing, found that the government did not obstruct defense counsel's interviews with Bell employees. The finding was not clearly erroneous.

Secondly, our reading of eleven volumes of transcripts satisfies us that the appellant's contention of unfairness by the trial judge is exaggerated. The court's restatement of evidence and questions to witnesses was designed only to simplify the very complex facts of the case.

We affirm all counts except count VI. That count carried a three-year concurrent sentence and a $1,000 fine. The three-year concurrent sentence and the $9,000 fine for the remaining nine counts stand.

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sistency in her testimony, if there is any, and you have a man sitting there with you, a man who heard all the testimony who is a lawyer, so why can't he look over this and inform you of anything you want to know about. Mr. Koopmans [co-defense counsel] can do that, he has heard everything the witness had to say."

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APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID C. HENNY, *Defendant-Appellant.*	Filed Jan. 9, 1976 Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals No. 74-2717 ORDER

Before: BROWNING, CARTER and GOODWIN, Circuit Judges.

The slip opinion dated October 20, 1975, is amended as follows:

1. On page 5, strike the entire first paragraph and delete footnote 3.

2. Renumber all subsequent footnotes in the slip opinion to reflect the deletion of footnote 3.

3. On page 9, in the first line, delete the sentence: "However, we need not reach this issue because the judge did not force defense counsel to receive the statements in the presence of the jury," and substitute instead the following: "We do not choose to follow *Gregory*. Moreover, in the case at bar, the judge did not uniformly force defense counsel to receive the statements in the presence of the jury."

4. On page 9, delete the following sentence: "Once defense counsel made known his objection, he never again had to ask for the statements," and in lieu thereof insert the following: "On only one occasion thereafter did defense counsel have to ask for the statements in the presence of the jury."

With the amendments above, the petition for rehearing is denied.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. DAVID C. HENNY, *Defendant-Appellant.*	No. 74-2717 OPINION

[October 20, 1975]

Appeal from the United States District Court
for the Western District of Washington

Before: BROWNING, CARTER and GOODWIN, Circuit Judges.

JAMES M. CARTER, Circuit Judge.

Defendant Henny, President and General Manager of the Whidbey Telephone Company, appeals from a judgment of conviction, following a jury trial, of a number of counts of wire fraud in violation of 18 U.S.C. § 1343 and aiding and abetting under 18 U.S.C. § 2. He received sentences of three years on each count, to run concurrently, and a fine of $1,000 on each of ten counts. We affirm in part and reverse in part.

Whidbey Telephone Company ("Whidbey") is an independent company serving approximately 2,700 subscribers on two islands in Puget Sound, Washington. It is regulated by the Federal Communications Commission ("FCC") (interstate) and the Washington Utilities and Transportation Commission ("WUTC") (intrastate). The toll (long distance) facilities of Whidbey interconnect at Everett, Washington, with the General Telephone Company of the Northwest ("General"), which interconnects with Pacific

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Northwest Bell ("Bell") at Seattle. Since it was necessary for the lines of the various telephone companies to interconnect to provide service to all subscribers, the toll costs and revenues for toll calls were usually divided among the companies on the basis of toll settlement or division of revenue agreements. However, during the years 1961-66, Whidbey had no sharing agreement with General and accordingly did not share its revenue with General.

Under the settlement agreement in effect from 1967 through August 15, 1970, Whidbey undertook to pay all revenues or charges at tariff rates for certain types of toll messages to General (and a national toll "pool"), and General was to pay Whidbey an approximation of its toll costs under a formula determined by a 1966 study of Whidbey's toll costs. Three types of messages are important with respect to this formula:

> *Sent paid* messages originated at a Whidbey telephone, and were billed to that phone. Whidbey was compensated for both the operating and billing function.
>
> *Sent collect* messages originated at a Whidbey telephone, but were billed to the terminating phone, hence compensation was only for the operating function.
>
> *Received collect* messages terminated at a Whidbey telephone and were billed there, but originated outside the Whidbey area; hence compensation was only for the billing function.

Under the General-Whidbey settlement agreement, General paid Whidbey a fixed sum for messages billed to Whidbey phones (i.e., sent paid and received collect messages), regardless of the duration of the call. In return, Whidbey paid the tariff rates for each such sent paid or received collect toll message, but Whidbey's payments were determined by the duration and distance of the calls. The result was that Whidbey received the greatest net gain for calls of short duration and for sent paid messages. Whidbey received less on received collect and sent collect messages.

The settlement agreement was subjected to various types

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of fraudulent manipulation by Henny, who personally authorized the actions. One scheme involved "person call back messages" for person-to-person calls originating at Whidbey, where the called party was not at home and instructions were given for the called party to return the call. According to proper industry practice, the called party should have been instructed to call operator "6" or "7" in returning the call. Operators "6" and "7" were local operators to the called party (non-Whidbey operators). These operators would "ticket" the return call. Therefore the call would be a received collect call for Whidbey.

Where the calling party had asked for the time and charges of his call, under industry practices the called party was instructed to use operator "55" to return the call. Operator "55" was a Whidbey operator, hence the call would be ticketed by Whidbey under the lucrative sent paid category. This was proper practice because Whidbey handled the major aspects of a "time and charges" call.

The fraud involved in the above situations was as follows:

(1) Henny instructed his operators to leave the operator "55" number with the called party on *all* person call back calls. By this means all received collect calls would be converted into sent paid calls. Both the called party and his local operator would not discover the fraud because they would have mistakenly presumed that "time and charges" had been requested by the calling party.

(2) Henny's friends or relatives also utilized the operator "55" scheme. When outside of the Whidbey area, they contacted a local operator and asked for operator "55", thus indicating they were returning a person-to-person call. The Whidbey operator recognized the caller and put in a false busy signal, misrepresenting that the Whidbey line was busy. All parties would hang up and the Whidbey operator would then place a call directly to the calling party and report the call as a sent paid message.

(3) Another scheme to defraud involved the reporting of free calls made by Whidbey's employees and friends. Tariffs permit certain free long distance calls by company employees. But Henny caused the free calls made by him-

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self, his employees, and friends to be reported to General as sent paid official company calls of three minutes or less in duration, when in fact many of these calls far exceeded three minutes. The settlement payments made to Whidbey for each sent paid call exceeded the three-minute charge for such a call. Whidbey thus collected unearned settlements from General in many of the instances when Whidbey reported an official company message as a sent paid message.

(4) Similarly, Whidbey gained revenues by giving free toll calls to its customers to obtain "time" information from the mainland in violation of the tariffs.

(5) Another fraudulent scheme involved Henny's inflation of the number of messages reported as placed from Whidbey to Seattle in order to induce the construction of a direct microwave link between Seattle and Whidbey.[1] Whidbey reported "test calls" as sent paid calls; it also gave free toll calls to a Seattle weather recording, and reported the calls as three-minute sent paid calls. Both tactics were fraudulent under industry standard operating practices.

(6) The final fraud involved a holding time test conducted during the week of May 3, 1971, to determine settlement payments. Henny properly established a "conference circuit" for the test, but he allowed and encouraged illegal users of the line, "phone phreaks", to use the line during the testing time, in order to increase General's settlement payments.

Refused Instruction on Franking Privileges

Many of the fraudulent schemes involved calls by Henny, his family, friends and employees. Henny claims that these calls were permitted by statute as a franking privilege. 47 U.S.C. § 210 (1934) so provided. Pursuant to this theory he sought jury instructions to the effect that it was

1. The Washington Utilities and Transportation Commission conducted feasibility studies for such projects. It was this study which Henny manipulated.

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not fraudulent to permit free use of the phones by employees and family members.[2]

Franking privileges apply to excuse tariff fees but not obligations under settlement agreements. Section 201(b) of the Federal Communications Act of 1934, 47 U.S.C. § 201 (b) (1934), permits common carriers to enter into contracts with one another for the exchange of services; and regulations issued under the Act by the FCC, 47 C.F.R. § 41.13(a) (1974),[3] state that the franking rules do not apply to "[s]ervices rendered pursuant to lawful contracts for exchange of services under section 201(b) of the act and which contracts are filed with the Commission. . . ."

Although Henny's friends were entitled to calls free from the tariffs, the conversion of received collect to sent paid messages and the timing and ticketing of these calls at three minutes or less, regardless of actual duration, constituted fraud. Since the franking privilege was irrelevant to settlement agreements, it was proper to refuse to instruct the jury on the privilege.

Jury Instruction

The trial judge gave an instruction to the jury which, Henny contends, was confusing and erroneous. In summary, the instruction stated that telephone companies are regulated by the FCC, that the companies also, by agreement, divide revenues obtained from the use of combined toll facilities, and that any device which avoids the proper billing is unlawful.[4]

2. The proposed instruction reads as follows:

"It is not a crime for a telephone company to provide unlimited free telephone service to its officers, agents, employees and their families, and to officers and employees of other telephone companies. The unlimited free telephone service provided by a telephone company to these persons includes unlimited free long distance toll calls. There is no limitation upon the length of each free long distance telephone call."

3. We also recognize that Whidbey did not keep the required records to qualify for the franking privileges. *See* 47 C.F.R. § 41.31(a)(1974).

4. The complete instruction reads as follows:

"Now, this next instruction relates to telephone companies and their positions as far as being a common carrier is concerned. I am going to tell you what a common carrier is in the law, and how

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The appellant contends that, since the jury convicted him, it apparently mistakenly interpreted the trial judge's instructions to mean that the FCC's rules have the force of criminal law. However, the illegal practices defined in the judge's instruction referred only to the violation of the standard operating procedures adopted by companies to divide revenues and did not refer to the FCC's rules.

Further, Henny claims that the instruction suggested that the mere breach of contract was illegal. This claim is unfounded because, in the words of the instruction, there is no mention of breach of contract. Criminal liability was said to attach only to "any billing practice that does not reflect the true nature of the toll call . . . or any use of the toll line by any device that avoids the proper billing of the toll call."

A final criticism is that the instruction assumed controverted facts not in evidence. The court stated that "the companies have adopted standard operating practices." Henny's contention misses the mark because he did not assert that there were no common practices, but he claimed that he was not subject to those practices because of his relationship to General and the uniqueness of Whidbey. It is not reversible error for the court to give an instruction

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these companies must operate in accordance with the rules and regulations under the law. I might tell you this is one that I made up myself. This isn't something that is handed down.

"Telephone companies are known in the law as common carriers, and are subject to the regulations by the government through what is known as the Federal Communications Commission. You have heard that described here. This commission, in a supervisory capacity, established certain rules under which telephone companies must operate. Interstate calls are toll calls, and certain charges must be made by the companies that control the lines over which these toll calls are carried. The companies also, by agreement, divide the revenues obtained from the use of the combined toll facilities. In order to determine the proper proportions of revenue for each company whose facilities have been used for a toll call, the companies have adopted standard operating practices providing for the timing of calls, and the point of billing, the ticketing, and the types of billing for the type of calls that are carried on connecting company lines. Any billing practice that does not reflect the true nature of the toll call as to the billing time, place of origin, nature of the toll call, or fails to show the use of the connecting lines or any use of the toll line by any device that avoids the proper billing of the toll call by the proper carrier is unlawful."

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which assumes an uncontroverted fact. *Lyons v. United States,* 325 F.2d 370, 374 (9 Cir. 1963).

While the instruction was not perfect, we fail to grasp how the jury could have been confused. The instructions which directly preceded the instruction at issue carefully listed and explained the critical elements of the charge: the scheme to defraud, specific intent, and causation. Reading all of the instructions together, as we must, we find that the instruction fully and fairly presented the issues and that any error in the disputed instruction was harmless. *Suggs v. United States,* 407 F.2d 1272, 1276 (D.C. Cir. 1969); *United States v. Fox,* 425 F.2d 996, 1000 (9 Cir. 1970).

Exclusion of Evidence

Henny contends that Whidbey was entitled to recover its costs from General, that it could not recover such costs without the allegedly fraudulent practices, and that therefore the practices were proper. In support of this somewhat odd contention, the defense put on Henny's accountant, Mr. Bumstead, who testified that Whidbey had not recovered its costs from 1967 to 1970. On cross-examination, the prosecution sought to introduce two highly prejudicial letters to impeach Bumstead. Because of their prejudicial nature the court would not admit them, but instead struck Bumstead's testimony. Henny contends that this deprived him of his rights under the Fifth and Sixth Amendments to present witnesses and conduct a defense.

Whether or not the prejudicial nature of the letters would have warranted the striking of the testimony, the error, if any, was clearly harmless. All Bumstead could have shown would have been an overall loss. That would not have justified fraudulent practices, and Bumstead's testimony could not have helped Henny. *See United States v. Weiss,* 491 F.2d 460, 464 (2 Cir. 1974), *cert. denied,* 419 U.S. 833 (1974).

Henny also cites as error numerous exclusions of evidence made by the trial court on the ground of lack of relevance. Much of the proffered evidence related to industry-wide standards, but the evidence was irrelevant because either

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it post-dated the relevant time frame, or it involved the reporting practices of other individual companies pursuant to other types of settlement agreements. As to the latter, the time expended and confusion created by proving the reporting practices of individual companies outweighed the minimal aid such evidence would provide in proving industry-wide standards.

The appellant also claims that the court improperly restricted testimony of the defendant and other witnesses to the indictment period, 1967-70. Henny's defense was that the various practices found to be fraudulent were instituted for proper reasons prior to the settlement agreement with General, and hence were admissible to show he lacked the specific intent to defraud General.

This contention fails. Although the court did exclude testimony of some witnesses as to the prior practices, such evidence was admitted elsewhere. The court admitted testimony showing the prior practice as to free long distance time, weather, and wake-up calls; the use of operator "61" (changed from "55" to "61" in March, 1970) by Henny's family and friends; and the ticketing and reporting of employee and test calls. The issue was fully submitted and argued to the jury. The defense itself, in closing argument before the jury, stated that the testimony introduced described the practices that existed prior to 1967.[5]

The court did exclude the answer to one relevant question. Henny was asked by defense counsel if the "operator 55 procedure [where friends would call "55" pretending to return a person-to-person call] was continued after January 1, 1971." The evidence was excluded because it was "outside the indictment period"; however, count VI of the indictment included fraudulent use of "55" from January 1971 to December 1972. Therefore we reverse count VI.

5. The defense stated that,

> "There has never been, in this trial, any dispute as to the practices that went on at the Whidbey Telephone Company from the years early in 1960 up, almost to the present time. Those practices have not been in dispute. . . . In the testimony, as you will recall it, was that in the year 1966, all of the types of calls that have been described to you as being a part of a scheme, a part of a method to defraud, previously existed."

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Jencks Act Statements

The appellant raises three contentions about the handling of Jencks Act [18 U.S.C. § 3500 (1957)] statements: he had to request such statements in the presence of the jury, he did not have sufficient time to review the statements, and the trial judge's remarks regarding the statements were improper.

One circuit has held it to be error for the judge to force defense counsel to demand and receive such statements in the presence of the jury. *Gregory v. United States*, 369 F.2d 185, 191 (D.C. Cir. 1966). Other courts have held this to be within the discretion of the Judge.[6] However, we need not reach this issue because the judge did not force defense counsel to receive the statements in the presence of the jury. The first time objection was made, the following colloquy occurred:

> "THE COURT: We could have saved a lot of time if you [Mr. Carter, the attorney for the government] had given him that [the statements] at recess time.
>
> "MR. CARTER: Yes, Your Honor, I should have, and I am sorry."

Once defense counsel made known his objection, he never again had to ask for the statements.

The appellant's second contention, that counsel had inadequate time to review the statements, is also without merit. In the instance, cited above, where the statements were not furnished prior to the direct examination, co-counsel was present and able to review the statements. In addition, the defense did not ask for a recess.

Finally, the appellant cites as reversible error the statement of the judge, in front of the jury, that "[a]ll you [defense counsel] are looking for is some inconsistency in her testimony, if there is any." The record shows that defense counsel had objected to the procedure of allowing the trial to continue while co-counsel reviewed the statements withheld from the defense. In response to the objec-

6. *United States v. Lepiscopo*, 429 F.2d 258, 260 (5 Cir. 1970), *cert. denied*, 400 U.S. 948 (1970); *United States v. Nielson*, 392 F.2d 849, 854 (7 Cir. 1968).

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tion the judge said, in essence, that he had hoped counsel had already examined the statements and that, in any case, co-counsel could adequately review them because he was present and would only be looking for inconsistencies.[7]

While the remark may have been better left unsaid, it was reasonable in the context of the trial. Also, we doubt that the defendant was prejudiced because this witness, whose Jencks Act statement was delayed, was only one of the many Whidbey operators who had testified to the practices of the company.

Two issues remain. First, the trial judge, after a hearing, found that the government did not obstruct defense counsel's interviews with Bell employees. The finding was not clearly erroneous.

Secondly, our reading of eleven volumes of transcripts satisfies us that the appellant's contention of unfairness by the trial judge is exaggerated. The court's restatement of evidence and questions to witnesses was designed only to simplify the very complex facts of the case.

We affirm all counts except count VI. That count carried a three-year concurrent sentence and a $1,000 fine. The three-year concurrent sentence and the $9,000 fine for the remaining nine counts stand.

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7. The record shows the following discourse:
"THE COURT: Do you [Mr. Carter, the attorney for the government] have another witness we can call so we can expedite this so we don't have to sit here while he reads it?
"MR. BURGESS [defense counsel]: Your Honor, I don't know what we are going to accomplish—
"THE COURT: Well, I had hoped that you would have had a chance to examine these. All you are looking for is some inconsistency in her testimony, if there is any, and you have a man sitting there with you, a man who heard all the testimony who is a lawyer, so why can't he look over this and inform you of anything you want to know about? Mr. Koopmans [co-defense counsel] can do that, he has heard everything the witness had to say."

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APPENDIX D

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case, to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 18, United States Code, Section 1343:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Title 18, United States Code, Section 3500:

> (a) In any criminal prosecution brought by the

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United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examina-

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tion of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1122

DAVID C. HENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 527 F. 2d 479.

JURISDICTION

The judgment of the court of appeals was entered on October 20, 1975. On January 9, 1976, an amended opinion was issued and a petition for rehearing was denied. The petition for a writ of certiorari was filed on February 9, 1976 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence established violations of the wire fraud statute, 18 U.S.C. 1343.

2. Whether petitioner was denied a fair trial by a comment made by the court concerning certain materials given to the defense under the Jencks Act or by the procedures by which Jencks Act materials were supplied at trial.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted of having committed wire fraud and of having aided and abetted the commission of wire fraud, in violation of 18 U.S.C. 1343 and 2. He was fined $1,000 on each of the ten counts on which he was convicted and was sentenced to ten concurrent terms of three years' imprisonment. The court of appeals affirmed petitioner's convictions on nine of the counts and reversed his conviction on the remaining count (Pet. App. A-1).[1]

The evidence at trial showed that petitioner—as president and principal stockholder of Whidbey Telephone Company ("Whidbey"), an independent telephone company franchised to serve two islands in Puget Sound, Washington—engaged in a multifaceted scheme to defraud two connecting telephone companies, General Telephone Company of the Northwest, Inc. ("General"), and Pacific Northwest Bell ("Bell"), of substantial revenues.[2] In essence,

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[1]The court of appeals reversed petitioner's conviction on Count IV of the indictment because the trial court had erroneously excluded certain evidence as outside the period referred to in the indictment (Pet. App. A-8).

[2]During the period of the fraudulent scheme charged in the indictment, Whidbey operated a toll center providing operator services for the manual timing and ticketing of all long distance calls originating on Whidbey and Hat Islands. Whidbey's facilities connected with General's facilities at Everett, Washington. General, in turn, connected with the Bell System at Seattle (Pet. App. A-1 to A-2).

the scheme involved the falsification of records of long distance telephone calls and had the effect of increasing, at the expense of General and Bell, Whidbey's net revenues under a division-of-revenue agreement between Whidbey and General.

Under the division-of-revenue agreement between Whidbey and General in effect during the period referred to in the indictment,[3] Whidbey agreed to turn over to General and a national toll pool all revenues realized from long distance telephone calls and General agreed to remit to Whidbey revenues approximating Whidbey's costs in handling such calls (V Tr. 164-171). The net revenue to which Whidbey was entitled under the agreement was computed by use of a formula, which had been developed on the basis of a study of Whidbey's toll costs (I Tr. 106-107). Application of the formula produced varying amounts of net revenue for Whidbey, depending upon the duration of the particular calls and whether the calls were "sent paid," "sent collect," or "received collect" (I Tr. 108-124; V Tr. 164-169).[4]

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[3]The rates for toll or long distance telephone calls were fixed by generally applicable tariffs, with interstate rates being regulated by the Federal Communications Commission and intrastate rates being set by the Washington Utilities and Transportation Commission. In order to provide its subscribers with access to long distance facilities, Whidbey entered into division-of-revenue agreements that apportioned the costs incurred and the revenues realized from telephone calls utilizing both facilities owned by Whidbey and by other telephone companies (see Pet. App. A-2).

[4]"Sent paid" calls were defined as those long distance calls originating at and charged to a Whidbey telephone. "Sent collect" calls were those originating at a Whidbey telephone but billed to the terminating telephone. "Received collect" calls terminated at and were charged to a Whidbey telephone (see Pet. App. A-2; I Tr. 108-109; VII Tr. 67).

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Although Whidbey turned over to General all revenues realized from toll calls, General remitted to Whidbey pursuant to the formula a fixed amount for each toll call billed to a Whidbey telephone. Thus, although Whidbey's payments to General for all telephone calls for which customer payments were made to Whidbey were affected by the duration of the calls, General's remissions to Whidbey were not similarly affected (see Pet. App. A-2). Other provisions of the agreement directed the payment to Whidbey of larger amounts for "sent paid" telephone calls than for "received collect" and "sent collect" calls (*ibid.*).

Petitioner fraudulently manipulated this settlement agreement in two ways. First, he directed his operators to misrepresent certain operator signals so as to change the status of calls from the "received collect" category to the more lucrative, for Whidbey, "sent paid" category (I Tr. 155-159; II Tr. 15-18, 179-180; V Tr. 126-129, 134-137; X Tr. 110-111). Second, petitioner fraudulently decreased the amount of Whidbey's payments to General by reporting "sent paid" calls as having been shorter than three minutes in duration when in fact many of the calls far exceeded three minutes (II Tr. 28-29, 118-119; IV Tr. 25-26; VI Tr. 94; IX Tr. 117-118, 196-202). By misrepresenting the duration of the toll calls, petitioner improperly reduced the amount of his payments to General and to the national toll pool.

Petitioner also engaged in a variety of other fraudulent practices depriving General and Bell of revenues belonging to them (see Pet. App. A-3 to A-4). Among other things, petitioner improperly used telephone codes on toll calls placed to Europe by himself and his friends to avoid the overseas operator responsible for timing and billing the calls, thereby defrauding Bell of its revenue for the calls (II Tr. 74-76, 188-190; IV Tr. 44-47, 155; V Tr. 155-158; X Tr. 84-85, 88). Petitioner also manipulated the sample study used to construct the formula apportioning revenues

between Whidbey and General in order to increase payments to Whidbey. He accomplished this by encouraging certain individuals, who were illegally using "blue boxes" to place toll-free calls, extensively to utilize a "conference circuit" he established during the period of the study (IV Tr. 91-93, 111-120; V Tr. 172-178; X Tr. 150-152).

ARGUMENT

1. Petitioner first contends (Pet. 6-12) that he was improperly convicted of having committed wire fraud, in violation of 18 U.S.C. 1343, on the basis of evidence tending to show simply that he had failed to comply with standard operating practices in the telephone industry. He asserts that his convictions violated fundamental elements of due process—*viz.*, the requirement that "prohibited activity be clearly and unambiguously proscribed, that the enactment of such prohibition not be delegated to private parties, and that the proscription not be unjustifiably discriminatory" (Pet. 7).

But the fact that the practices described in the indictment and established at trial may have violated standard operating practices in the telephone industry does not preclude petitioner's convictions for wire fraud. As noted, the evidence at trial showed that petitioner knowingly made misrepresentations as part of a plan to deceive others and to obtain money and property by false pretenses. In submitting the case to the jury, the court carefully described the elements of the offenses with which petitioner had been charged—including the requirement that the government prove beyond a reasonable doubt that petitioner had devised a scheme to defraud General and Bell of revenues with the specific intent to do so (XI Tr. 70-71). The court went on to define the phrase "scheme or artifice to defraud," as used in 18 U.S.C. 1343, as including (XI Tr. 72)—

> any plan or course of action intending to deceive others and to obtain by false or fraudulent pretenses, representations or promises, money or property from persons so deceived. A statement or representation is false or fraudulent within the meaning of the statute, if it is known to be untrue and made, or caused to be made[,] with intent to deceive.

In support of the contention that his convictions were not based upon proof of a scheme or artifice to defraud, but upon proof tending to show that he had violated standard industry operating practices, petitioner has relied upon (see Pet. App. A-16 to A-17 n. 4) a subsequent portion of the court's instructions in which the court stated (XI Tr. 73-74):

> The companies also, by agreement, divide the revenues obtained from the use of the combined toll facilities. In order to determine the proper proportions of revenue for each company whose facilities have been used for a toll call, the companies have adopted standard operating practices providing for the timing of calls, and the point of billing, the ticketing, and the types of billing for the type of calls that are carried on connecting company lines. Any billing practice that does not reflect the true nature of the toll call as to the billing time, place of origin, nature of the toll call, or fails to show the use of the connecting lines or any use of the toll line by any device that avoids the proper billing of the toll call by the proper carrier is unlawful.

We submit that this statement properly related the elements of the offense prescribed at 18 U.S.C. 1343 to the evidence adduced at trial. The statement did not permit the jury to convict petitioner on the basis of evidence showing that he had violated standard industry operating practices—rather, the statement correctly informed the jury that it is

unlawful under the wire fraud statute intentionally to employ any billing practice to avoid the proper billing of a toll call. See *Scott* v. *United States*, 448 F. 2d 581, 582 (C.A. 5); *Brandon* v. *United States*, 382 F. 2d 607, 610 (C.A. 10).

2. At one point during the trial, petitioner's counsel objected to the court's allowing the trial to continue while his co-counsel reviewed a statement of a government witness provided to the defense under the Jencks Act, 18 U.S.C. 3500 (II Tr. 143). Petitioner now contends (Pet. 12-14) that the court committed reversible error by stating, in overruling that objection, that co-counsel could review the statement without interrupting the trial because "[a]ll you are looking for is some inconsistency in her testimony, if there is any" (II Tr. 143).

As the court below correctly determined, however, although the statement quoted above might better have been left unsaid, it does not require the reversal of petitioner's convictions (see Pet. App. A-9 to A-10). Petitioner has not shown how he could have been prejudiced by the comment, which was made in the context of the essentially cumulative testimony of one of the many Whidbey telephone operators who testified concerning Whidbey's operating practices.

The decision of the court below with respect to this issue does not conflict with the holding in *United States* v. *Stahl*, 393 F. 2d 101 (C.A. 7). In *Stahl*, as in this case, the court of appeals held that while a comment by the trial judge concerning use by the defense of Jencks Act materials (which was similar to the comment made by the court in this case) had been improper, it did not require reversal of the defendant's conviction. See also *United States* v. *Frazier*, 479 F. 2d 983, 985-986 (C.A. 2).

Petitioner also incorrectly suggests (Pet. 12) that affirmance of his convictions conflicts with decisions in several other circuits which hold that it is ordinarily improper to require the defense to request Jencks Act materials in the presence of the jury. *E.g.*, *United States* v. *Curry*, 512 F. 2d 1299, 1302-1303 (C.A. 4); *United States* v. *Nielsen*, 392 F. 2d 849, 853-854 (C.A. 7); *Gregory* v. *United States*, 369 F. 2d 185, 191 (C.A. D.C.); *United States* v. *Frazier*, *supra*.[5] These cases uniformly hold that courts should permit such requests to be made outside the presence of the jury, if the defense so requests. The record does not indicate that the defense at any time approached the sidebar and requested the court's permission to ask for Jencks Act material outside the jury's presence. Petitioner's assertion that the defense requested the materials in the jury's presence because required to do so by the court is similarly without support in the record.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[5]See also *Beaudine* v. *United States*, 414 F. 2d 397, 401-403 (C.A. 5); *Pallotta* v. *United States*, 404 F. 2d 1035, 1036-1037 (C.A. 1).

DOJ-1976-05